IN THE

Supreme Court of the United States

JOHN E. HAMPTON, ROBERT P. ALLEN AND JOHN W. CROCKETT, AS RAILROAD COMMISSIONERS OF THE STATE OF ARKANSAS, ET AL., APPELLANTS,

vs. No. 204

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, APPELLEE.

BRIEF FOR APPELLANTS.

ABSTRACT OF THE CASE.

The appellee, a railroad company, and common carrier of persons and goods, owning and operating lines of railroad, between points in Arkansas, and between points located in that State and points in other States, filed its bill of complaint in equity, in the Circuit Court for the Western Division of the Eastern District of Arkansas, praying, for the reasons

therein set forth, that the appellants, as the Railroad Commission of Arkansas, and the prosecuting attorneys of the Fifth and Fifteenth Judicial Districts of that State, under the orders of the Commission, be "restrained and enjoined from instituting, prosecuting, aiding, abetting, directing or causing to be instituted or prosecuted any and all suits of whatsoever nature by which it may be sought to enforce or recover the fines and penalties" contemplated by the Act of the Legislature of that State, approved April 19th, 1907, more popularly and familiarly known as "The Barker Act" (because it was introduced by a Senator Barker), and certain orders of the said Railroad Commission, being Order No. 346 and two Orders No. 353A, one being an amendment of the other. (Printed Record, 1 to 13.)

The Act of April 19th, 1907, was copied at length, and made Exhibit "C" to the bill of complaint, and it appears on pages 26 to 33 of the printed record. The orders of the Commission complained of in the bill are copied at length on pages 33 to 44 of the printed record, and constitute Exhibits "D," "E" and "F" thereto.

Later on the appellee filed its supplemental bill, which was a repetition of the original bill and contained some additional matters. (Printed Record, 46 to 59, inclusive.)

An answer was filed on behalf of the appellants. (Printed Record, 65 to 70, inclusive.) The case was submitted upon the supplemental bill and answer, and under a stipulation which is recited in the decree, and a decree was rendered in favor of the appellee. (Printed Record, 74.)

The decree recites:

"Now, on this 26th day of June, 1908, the above entitled cause came on for hearing, all parties, complainant and defendants, appearing by counsel, it is agreed by the parties that the only question necessary for the final determination of the cause is that raising the constitutionality of the Act of the General Assembly of the State of Arkansas, No. 193, approved April 19th, 1907, entitled 'An Act to regulate freight transportation by railroad companies doing business in the State of Arkansas,' and after argument of counsel, the court being well and sufficiently advised in the premises, the court doth hold the said Act to be unconstitutional and void.

"It is adjudged, ordered and decreed that the temporary injunction heretofore and herein granted be and the same is made perpetual and it is adjudged, ordered and decreed that the defendants, John E. Hampton, Robert P. Allen and John W. Crockett, as Railroad Commissioners of the State of Arkansas, their agents, attorneys and all other persons acting under their direction, and Henderson M. Jacoway, as prosecuting attorney of the Fifth Judicial District of the State of Arkansas, and James Cochran, as prosecuting attorney of the Fifteenth Judicial District of the State of Arkansas, and their successors in office, be and they are hereby perpetually restrained and enjoined from instituting, prosecuting, aiding, abetting,

directing or causing to be instituted or prosecuted any suit or proceeding whatsoever, by which it is sought to enforce or recover any fines or penalties of or from the St. Louis, Iron Mountain and Southern Railway Company, for any violation or violations of the provisions of the Act of the General Assembly of the State of Arkansas, entitled 'An Act to regulate freight transportation by railroad companies doing business in the State of Arkansas,' approved April 19th, 1907, or any rule or rules, or order or orders made by such Railroad Commissioners by virtue of said Act, and particularly by virtue of Order No. 346 of said Commission, effective June 19th. 1907."

A "Memorandum of Decision" also appears in the record, which states the two grounds upon which the circuit court held the Act to be unconstitutional, and the orders aforesaid to be unenforcable. These grounds are stated to be as follows:

"*First.* By the last sentence of section seventeen (17) it is clearly shown that the intention of the Legislature was to apply its provisions to interstate shipments as fully as to intrastate shipments, and there is nothing in the Act to indicate that the Act would have been passed unless it could thus be made applicable. This is clearly an interference with interstate commerce, and as this provision can not be disregarded without defeating one of the main objects of the Act, it is unconstitutional.

"*Second.* The requirement to furnish cars is absolute and makes no exceptions for cases of a sudden congestion of traffic, actual inability to furnish cars by reason of their temporary detention in other States or in other places within the same State; none for interference of traffic occasioned by wrecks, accidents or strikes." (Printed Record, 75, 76.)

The decree and the rulings were had on a state of case disclosed by the original and supplemental bills and the answer and the Order No. 353A, to be as follows:

CASE SHOWN BY THE RECORD.

For many years the St. Louis, Iron Mountain and Southern Railway Company had "failed and refused to supply the shippers of Arkansas, engaged in shipping property from one point in the State to the other points in the State, with cars; that in this manner it (had) seriously affected all lines of business in said State for many years * * *; that the failure to furnish said cars was not due or owing to any emergency or conditions which said complainant, by the exercise of common law diligence could not and was not required to be prepared for; that said failure was not only caused by its own wilful acts in utter disregard of the rights of shippers, but was the result of a policy pursued by said complainant, that had ruined and destroyed persons engaged in business in said State; that to partially meet the said evils legislation was required whereby the complainant could be required to furnish cars upon notice, the purpose and intent of such legislation being to make the common law obligations of complainant, as to common carrier by rail, more definite and certain rather than to create penalties; that prior to and after the enactment of the said Act of April 19th, 1907, the complainant was interested in and controlled the Western Coal and Mining Company, which was engaged in selling and mining coal, by car load and otherwise, in competition with other companies and individuals owning and operating coal mines in said State of Arkansas; that although the said complainant failed and refused to supply cars to

said other coal operators, upon one pretext or another, prior to and after the passage of said Act of April 19th, 1907, it always appeared to have a sufficient number of cars to supply the need of said Western Coal and Mining Company. * * * That evils which arose from the policy of complainant, in relation to its failure and refusal to furnish a proper supply of cars to said coal operators, in the same manner as cars were supplied to the said Western Coal and Mining Company, finally induced the passage of the Act of April 19th, 1907, aforesaid; it being intended by said Act not to discriminate against cars to be used in interstate traffic, but it not being contemplated by said Act to improperly deal with or burden interstate commerce." (Printed Record, 68, 69; extract from the answer. See also Order No. 353A, pages 39 to 44.)

The statement just given is taken from the answer, and was responsive to the original and supplemental bill, both of which undertook to make it appear that in the issuance of Order No. 353A, on the petition of coal operators in Johnson and Franklin counties, Arkansas, the appellee had been subjected to a burden, due to no fault on its part, growing out of events beyond its control.

The petition so filed is mentioned in the original and supplemental bills, being the petition of Hill, Hackney & Company and others before the Railroad Commission of Arkansas. It there appears, and it also appears by allegation in the answer, and from Order No. 353A itself, that the appellee was heard on the petition, and that the order was made after care

ful consideration, on evidence. (See Printed Record, 52 for the matter set forth in the supplemental bill.) To paragraph five of the bill the answer responded: "That the parties mentioned in paragraph five * * * comprised such rival and competing coal operators, who, by petition to said Railroad Commission, besought its aid to compel the said complainant to obey the reasonable requirements of the law in relation to the supply of cars on the ..... day of October, 1907. That said Railroad Commission did not thereupon act in anywise arbitrarily, but gave timely notice to complainant of the filing said petition, and gave all parties their proper opportunity to present all matters and things that should be presented to said Commission upon a hearing thereof. That the said complainant for a long time endeavored to defeat a fair inquiry into said matters, by refusing to produce the books relating to the supply of cars so made to said Western Coal and Mining Company, and that at the final hearing of said matters presented by said petition it appeared to said Commission that the said complainant through its wilful act, for the purpose of aiding and abetting the said Western Coal and Mining Company in furthering its business of selling coal for commercial purposes, and defeating the competition offered by the petitioners in said matter, had supplied

said company with sufficient cars; but had failed and refused to supply such cars to complainant." (Printed Record, 39.)

The supplemental bill also set forth that the failure on appellee's part to supply cars was owing to an unusual demand upon its supply of cars, and to the necessity of using cars to haul coal for its own use, produced by the destruction of a large quantity of coal, which it had stored, by fire. (Printed Record, 56, paragraph xi of the supplemental bill.) But this allegation was denied in the answer. (Printed Record, 69.)

The original and supplemental bills set up the following additional reasons for holding the Act of April 19th, 1907, and the orders of the Commission, unconstitutional and void:

A. The Act makes no provision for any exception to the rule which requires the furnishing cars to shippers upon short notice, and does not allow for contingencies, such as congestion of traffic, or delays occasioned by washouts and other unavoidable events. (Paragraph vi, supplemental bill, Printed Record, 53.)

B. The Act and orders of the Commission are in conflict with Section 3 of the Act of Congress relating to interstate commerce; and they do not make proper allowance for the duty appellee owes to other localities in supplying cars. (Printed Record, 54, paragraph viii, supplemental bill.)

C. The cars of appellee mentioned and referred to in the Act and orders were and are instrumentalities of interstate commerce and are exclusively under the control of the Interstate Commerce Commission. (Printed Record, 54, 55, supplemental bill, paragraph ix.)

D. The effect of the Act of April 19th, 1907, and the orders is to impose heavy penalties upon the appellee, which are unjust, oppressive, harsh and excessive, and operate so as to constrain the appellee to yield instant obedience to the said Act and orders, without question, and without a fair opportunity to have the validity thereof determined in due and orderly course of judicial proceedings. (Printed Record, 55, 56, supplemental bill, paragraph x.)

The allegation in the bill that the Commission is constantly attempting to impose upon the appellee the burden of furnishing cars to shippers in Arkansas, for the movement of freight in the State of Arkansas "and elsewhere" is denied in the answer. (Printed Record, 57, paragraph xii of bill, and 69 as to answer.)

There are many recitals in the answer, other than those already quoted or mentioned, which go to the point that no orders of the Railroad Commission were arbitrary or beyond its province, and it was therein averred that, if suits were instituted in the courts against appellee for penalties, it would have its day in court to answer thereto. (Printed Record, 70, 71.)

Though the constitutionality of the Act of April 19th, 1907, and the orders of the Commission referred

to, is the issue which was submitted to the circuit court, that does not mean that this question was submitted as a moot question, irrespective of the features of the case, which were presented by the record. There is, we submit, a vast difference between a case where a law of a State is being oppressively used and one where it is not being so used. And, we assume, an Act of a State Legislature and orders of a State Railroad Commission, will not be judged by any standard other than that disclosed by the facts in the record. At least it will not be assumed that such an Act and orders can be oppressively used, unless that conclusion is imperative, in a theoretical point of view.

ERRORS ASSIGNED.

The following errors are assigned to the decree and findings of the circuit court:

1. The decree improperly decides that the Act of April 19th, 1907, is unconstitutional under Section viii of Article I, of the Constitution of the United States.

2. There was no deprivation of property within the meaning of the Fourteenth Amendment to the Constitution of the United States,

3. There is no impairment of the obligation of a contract within the meaning of the Constitution of the United States.

4, 5. It was improper and erroneous to hold the whole of the Act of April 19th, 1907, unconstitutional.

6, 7. The circuit court should not have granted a perpetual injunction depriving the appellants of the right to enforce fines and penalties of any kind or under any circumstances, for violation of the provisions of the said Act and the orders of the Commission under it.

8. The matters and things presented by the bill and answer, upon which the cause was submitted, did not warrant the making of the decree. (Printed Record, 78, 79.)

STATEMENT OF POINTS INVOLVED.

1. The original and supplemental bills proceed, among other things, upon the idea that, because the transportation of cars in interstate hauls, constitutes a very large percentage of the railroad business of the country, therefore, the furnishing of cars, as contemplated by the Act in question, is not within the State power, since, *ex hypothesi,* the matter of directing supply of cars for intrastate traffic is bound,

directly or indirectly, to affect interstate transportation.

But the material matters set forth in the bill do not involve any such danger. And no matter how extensive interstate traffic may be as compared with state traffic, it does not follow that Congress may legislate upon matters committed to the States, even though the law would tend to become more uniform if this were done.

Employers' Liability Act, 207 *U. S.*, 463.
Adair vs. United States, 208 *U. S.*, 176, 180.
Railway Company vs. McKendree,
203 *U. S.*, 514.

Besides, Congress has not undertaken to cover the whole subject of supply of cars; and this is material.

2. The appellee has not been damnified by any action of the Railroad Commission had prior to the filing of its bill; unless the Order No. 346, which was a reproduction of the Act of April 19th, 1907, itself, without more, was unconstitutional.

3. The main ground of appellee's complaint is that the Railroad Commission made the Order No. 353A, which aimed at having the prosecuting attorneys of the Fifth and Fifteenth Districts to institute suits for penalties, for the failure of the appellee to furnish

cars to the coal operators of Johnson and Franklin counties, Arkansas, in September, 1907. And in that connection it magnified the quantity of penalties which might be imposed upon it. (See Printed Record, 39 to 44.) But in the decree of the circuit court the ground so selected was passed over as of no importance.

4. The decree rests upon grounds which do not constitute the gravamen of the bill, but are general and theoretical, and pass over the matters so principally relied upon as if of no merit.

5. Yet the decree perpetually enjoins the enforcement of Order No. 353A.

6. Appellee is entitled only to raise the question of unconstitutionality of the Act of April 19th, 1907, so far as that is material to its case.

Gas Illuminating Co. vs. Lungren, 152 *U. S.*, 200.

Howard vs. Stillwell, 139 *U. S.*, 199.

Telegraph Co. vs. Hall, 124 *U. S.*, 444.

Phillips Construction Co. vs. Seymour, 91 *U. S.*, 646.

Smith vs. Cowdry, 1 *How.*, 28.

The Appollon, 9 *Wheat.*, 362.

7. The mere imposition of penalties by a statute does not, of itself, furnish a cause of action to every citizen or corporation which, in time to come, may be affected by it. And penalties in large sums have been upheld where they were justified by the course of conduct of the complaining party.

Waters P. Oil Co. vs. Texas, 212 *U. S.,* 86, 111.
Armour Packing Co. vs. United States, 208 *U. S.,* 274.
Loewe vs. Lawler, 208 *U. S.,* 274.
Seaboard Air Line vs. Seegers, 207 *U. S.,* 73.
Chattanooga F. Co. vs. Atlanta, 203 *U. S.,* 390.
Marvin vs. Trent, 199 *U. S.,* 22.
National Oil Co. vs. Texas, 197 *U. S.,* 115.
Railway Co. vs. May, 194 *U. S.,* 267.
Addyston Pipe Co. vs. United States, 175 *U. S.,* 211.

Corporations, especially powerful ones, can only be reached by means of large penalties.

See cases last cited.

Also—

N. Y. Central R. R. vs. United States, 212 *U. S.,* 481, 495.

The decision in *Ex Parte Young,* 209 *U. S.,* 125, relied upon by appellee, dealt with the rate question.

The State law there made the rate, which it was claimed was confiscatory, and the State law imposed very severe penalties, including imprisonment, for failure to apply the rate. The circuit court had enjoined the enforcement of the State law, and the Attorney General of the State, Mr. Young, undertook to disregard the injunction. He was haled before the circuit court for this contempt of its order. And he was found guilty of contempt. Thereupon he applied to this court to be released by *habeas corpus*, claiming that he was not amenable to that court, and that its order was void. This position was held untenable and the order holding him for contempt was allowed to stand. In passing upon the merits of the controversy in which the injunction was granted this court held that there was, in that case, an oppressive use of State power, amounting to a denial of justice. The facts and issues there have no analogy to the facts and issues in this case.

8. The decree and the bills deal with imaginary evils, in this, that matters are made the basis of complaint and determination which lie altogether in the lap of the future, and have not transpired. In other words, orders for cars, in cases where the appellee will be unable to furnish the same by reason of strikes or holocausts, or earthquakes, or other *vis major*, have

not yet been made; yet these are made the basis of relief. Imaginary evils will not be considered, in the determination of causes.

United States vs. Railroad Companies (Commodities Clause Cases), 213 *U. S.*, 366, 407, 408.

The Employers' Liability Cases, 207 *U. S.*, 463.

Angle vs. Railroad Co., 151 *U. S.*, 1.

Amy vs. Watertown, 130 *U. S.*, 301.

Doyle vs. Insurance Co., 94 *U. S.*, 535.

Brewer vs. Bougher, 14 *Pet.*, 178.

Fletcher vs. Peck, 6 *Cr.*, 87.

Calder vs. Bull, 3 *Dall.*, 386.

9. The preceding points are touched upon to show that so far as this case is concerned, the appellee is not in the position of one who can claim that an oppressive use is being made of an enactment of the State of Arkansas, or any orders of its Railroad Commission, and that unless the Act and orders complained of are vicious in principle, without reference to the use they are being put to, the decree of the circuit court is erroneous. We take up more fully and detail the question as to the constitutionality of the Act and orders aforesaid [We assume that it is best to avoid repetition, and once for all to fully present that matter.]

THE ACT OF THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS, OF APRIL 19TH, 1907, AND THE ORDERS OF THE RAILROAD COMMISSION.

As already stated the Act of April 19th, 1907, is copied at length in the printed record, on pages 26 to 33. While Order No. 346 was made and promulgated by the Railroad Commission, under the Act, it seems to have been but a copy of that Act, and was unnecessary. Section 23 of the Act, under which the order seems to have been made, did not contemplate such action.

As shown by the answer, the Act was called for by an evil practice of the appellee, of long standing. And it bears evidence that it is not one-sided.

A. Section 1 of the Act provides for the furnishing of cars within a certain period. Section 2 regulates the movement of freight cars. Section 3 provides for notice of arrival of freight, and Section 4 provides for the manner of delivery of freight. Section 5 prescribes demurrage charges applicable to both shipper and railway company. And these charges are also regulated in Sections 6, 7 and 9 to 15, inclusive Section 8 defines "legal notice." Section 16 prohibits discrimination on the part of the railroad company, its officers or employes.

Section 17, after dealing with connecting carriers and providing for the furnishing of reasonable facilities in such cases, for the transportation of freight, contains the following independent clause:

"Interstate railroads shall furnish cars on application for interstate shipments the same in all respects as other cars are to be provided by interstate railroads under the provisions of this Act."

There is no provision of the Act which obliges interstate railroads to furnish cars, but the Act may be construed to contemplate this. However, the aim of the clause is to make it clear that there shall be no discrimination against cars for interstate shipments.

Section 18 defines "railroad companies" and other terms used in the Act. Section 19 confers jurisdiction upon certain courts of the State in relation to matters arising under the Act. Section 20 seeks to reach the evil of bribing railroad trainmen in order to secure speedier service. Section 21 gives action for damages caused by railroad companies by failure to comply with the Act.

Section 22, in addition to the action for damages, provides that the penalty for disregard of the Act shall be as follows:

Not less than five hundred dollars nor more than three thousand dollars for each violation of the Act or

the rules and regulations of the Commission based upon the Act; such penalty to be recovered by civil suit in the name of the State of Arkansas, in the county where the violation occurred. The Commission is to institute the actions, through the prosecuting attorney of the proper district, who is to receive a fee not to exceed twenty-five per cent of the amount recovered.

Section 23 gives the Commission power to formulate rules for the furnishing cars and transportation and delivery of freight, in compliance with the provisions of the Act. Section 24 provides that the remedies given by the Act shall be cumulative.

B. There are provisions in the Act making allowance for contingencies and occurrences over which the railroad company may have no control. Section 2 provides, among other things:

"The period during which the movement of freight is suspended on account of accident or any cause not within the power of the railroad company to prevent, shall be added to the free time allowed in this section, and counted as additional free time."

The Act is entitled "An Act to regulate freight transportation by railroad companies doing business in the State of Arkansas." And the furnishing of cars is provided for as part of the transportation, otherwise called "movement of freight," contemplated by the Act. If the movement of freight includes the furnishing of cars then here is a clause which, in terms, provides for contingencies and accidents.

Section 6 also provides that

"The railroad companies shall not be compelled to furnish cars for future shipments to parties in default as to payment of demurrage charges," etc.

C. The decree and findings of the circuit court were handed down on June 26, 1908. On March 1, 1909, the Supreme Court of Arkansas passed upon the Act in question, under circumstances similar to those obtaining here. The case so decided is the case of *Oliver vs. Chicago, Rock Island and Pacific Railway Company*, 89 *Ark.*, 466. There the points decided were the same that were passed upon by the circuit court. First, the court construed the Act with reference to the clause of Section 17 of the Act, which the learned judge of the circuit court held to make the Act unconstitutional. The Supreme Court declined to say whether in its judgment the clause was unconstitutional, but assuming that it was, as conceded by counsel in that case, it was there decided that the Act was effective and constitutional as to intrastate transportation, and that the clause might be dispensed with without affecting the rest of the Act.

Second, the court there dealt with the point whether the Act was unconstitutional, because it did not provide for reasonable defenses by the railroad companies. The court said as to this:

"Must the Act be held unenforceable as a State law for the reason that it does not upon its face expressly provide for reasonable defenses to be interposed when actions may be brought under it? The whole law is not in the Act of the Legislature; it is party there, partly in the Constitution, and partly in the higher rights of property that the courts will always protect."

89 *Ark.*, 469.

Finally it held, following a line of cases decided by the same court under other, but similar Acts, where express exceptions allowing for contingencies and the like did not appear in the enactment, that if this law provided for no defense which amounted to an excuse for not furnishing cars, it must be construed so as to let in all of such defenses.

Id.

See also—

Railway Company vs. Clay Gin Co.,
77 *Ark.*, 357, 362.

Railway Company vs. State, 85 *Ark.*, 311.

The Supreme Court of Arkansas usually construes the Acts of the Legislature of that State not to relate to interstate commerce though there may be nothing in the Acts themselves to that point.

Gunn vs. White Sewing Machine Co.,
57 *Ark.*, 24.

Railroad Company vs. Hanniford,
49 *Ark.*, 291.

This is in accordance with the principle that that interpretation will be adopted which will sustain an Act rather than the contrary.

United States vs. Railroad Companies (Commodities Clause Cases), 213 *U. S.*, 366, 407, 408.

Knights Templer Co. vs. Jarman, 187 *U. S.*, 197, 205.

And the construction put upon the Act of April 19th, 1907, by the Supreme Court of Arkansas, will be followed by this court.

Hammond Packing Co. vs. State of Arkansas, 212 *U. S.*, 322, 347.

Waters P. Oil Co. vs. Texas, 177 *U. S.*, 28.

Henry vs. Nicolay, 95 *U. S.*, 619.

Railroad Company vs. Adams, 181 *U. S.*, 580.

D. The Supreme Court of Arkansas declined to express an opinion on the point, as to whether the clause of Section 17 found objectionable by the circuit court was in fact so. That clause means that in the furnishing cars railroads which are interstate in their relations, shall so far as interstate cars are involved, not be compelled to discriminate against the same by anything contained in the Act. A reasonable construction would have made the Act state the same thing.

Such a provision showed quite clearly that the aim was not to burden interstate commerce, or put the railroad company in such a position that it could not comply with its interstate obligations.

If the decision in *Houston and Texas Central Railroad vs. Mayes,* 201 *U. S.*, 321, is any criterion on this point, it is authority for the proposition that the States (and their Railroad Commissions) may deal with the subject of furnishing cars, even though some or all of the cars to be furnished are destined for interstate transportation.

There a number of stock cars were ordered by a shipper in Texas, for live stock, to be shipped to Oklahoma. The case was on the border line as to whether or not sufficient allowance had been made there for accidents and contingencies, for there was a strong dissent. And there can be no doubt that if in that instance the same stand had been taken by the Supreme Court of Texas, as has been taken by the Supreme Court of Arkansas, in the case cited, the order of the Commission in the Mayes case and the law of the State would have been sustained by an undivided court. So that it is not an undue interference with interstate commerce, for the local State bodies to deal with the car-supply question even though the cars are destined

outside of the State. The more recent decision in the case of *Missouri Pacific Railway vs. Larabee Milling Company,* 211 *U. S.*, 612, is equally decisive on that point.

These rulings, not as yet very well understood, evidently go upon the principle that, even though Congress has the power to deal with the whole subject of interstate commerce, in all of its phases, down to the local supply of cars in all parts of the country, yet that there may be State police direction in reference to matters which may be so covered by Congressional legislation, so long as Congress has not dealt with the matter; with this proviso: that the action of the State may not amount to an undue burden upon interstate commerce. City ordinances providing for certain manner of lighting vessels in particular harbors have been sustained, notwithstanding that Congress had provided a general system of lighting applicable to vessels engaged in navigating the seas, while in harbors in the United States. Acts relating to publication of rate tables have been sustained, though they affected transportation between States; Congress not having covered the matter. Laws relating to the licensing of locomotive engineers have been sustained, although such engineers have been employed

in operating engines in interstate commerce. And this, by no means, exhausts the list.

Brig James Gray vs. Ship John Fraser, 21 *How.*, 184.

Railroad Company vs. Fuller, 17 *Wall.*, 560.

Smith vs. Alabama, 124 *U. S.*, 465.

Railway Company vs. Alabama, 128 *U. S.*, 96.

Railway Company vs. Ohio, 173 *U. S.*, 285.

Railway Company vs. Illinois, 163 *U. S.*, 142.

Railway Company vs. Illinois, 177 *U. S.*, 514.

Gladsen vs. Minnesota, 193 *U. S.*, 53.

Atlantic Coast Line vs. Wharton, 207 *U. S.*, 335.

See American Law Review, Sept.-Oct., 1908, 666 *et seq., where the decisions of this court are reviewed.*

E. So that in no point of view was the circuit court justified in holding that the Act of April 19th, 1907, was unconstitutional. It was not entirely unconstitutional because of the clause of Section 17 of the Act, nor because the Act did not set forth at length all the defenses which the railroad companies could set up as reasonable and legal excuses for failure to furnish cars. Thus far the circuit court went and no farther. And in these respects that court has been shown to be in disagreement with the Supreme Court of the State.

F. And furthermore we submit that, in itself, the clause found to be objectionable by the circuit court is not so, because it does not discriminate against interstate commerce, but seeks to provide that interstate commerce shall not be affected thereby in any discriminative way. If the circuit court took the view that the attempt to require the furnishing of cars for property, to be sent beyond the State, was a regulation of interstate commerce, such view seems to be in conflict with the decisions of this court. But even then the question is not involved here, because the answer denies that any such thing obtained.

G. The point is involved here, although that is not necessary to a decision of this cause, as to whether cars are committed to interstate commerce when a notice is sent by the shipper that he requires certain cars for shipments to points in other States. We submit that so long as the cars are not loaded they are not so committed to interstate or intrastate commerce that their destination may not be changed; and that therefore the States ought to properly deal therewith.

See—

Coe vs. Errol, 116 *U. S.*, 517.

American, Etc., Co. vs. Speed, 192 *U. S.*, 500.

Railroad Co. vs. Mayes, 201 *U. S.*, 321.

Missouri Pac. Ry. Co. vs. Larabee Milling Co., 211 *U. S.*, 612, *especially the opinion of Mr. Justice Holmes.*

We are aware that, under the coupler and air brake Acts of Congress, it has been held that dining cars standing upon sidetracks are committed to interstate commerce within the meaning of those Acts. This and similar cases have been decided upon the theory that cars may be engaged in transportation although they may be temporarily on a side track, awaiting the coming of an engine or train to take them on. Such cars are equipped or loaded for the haul, which at the time is impending, and are in use for that purpose.

H. As to the orders of the Railroad Commission it may be said, that if the Act of April 19th, 1907, is unconstitutional, Order No. 346 ought not to have been made. Really the order was unnecessary. As to Order No. 353A, the facts show it to have been proper.

CONCLUSION.

We submit that we have shown:

1. That the Act of April 19th, 1907, does not improperly deal with or interfere with interstate commerce, either under the last paragraph of Section 17, or otherwise.

2. That the Act, as construed by the Supreme Court of Arkansas, since the decree was handed down

by the learned judge of the circuit court, is innocuous, both in reference to the last paragraph of Section 17, and because it does not expressly provide, on its face, for all the defenses which a court ought to consider, in relieving a railroad company from the consequences of its failure to furnish cars when ordered.

3. There is no equity in the bill or the supplemental bill. On all essential points the allegations of these bills were denied by the answer, and the cause was submitted on these.

4. The orders of the Railroad Commission of Arkansas, whether Order No. 346 or Order No. 353A, are not invalid for unconstitutionality, on any ground.

And we respectfully submit that the decree of the circuit court is erroneous and should be reversed, and that the bill and supplemental bill should be dismissed for want of equity.

Respectfully,

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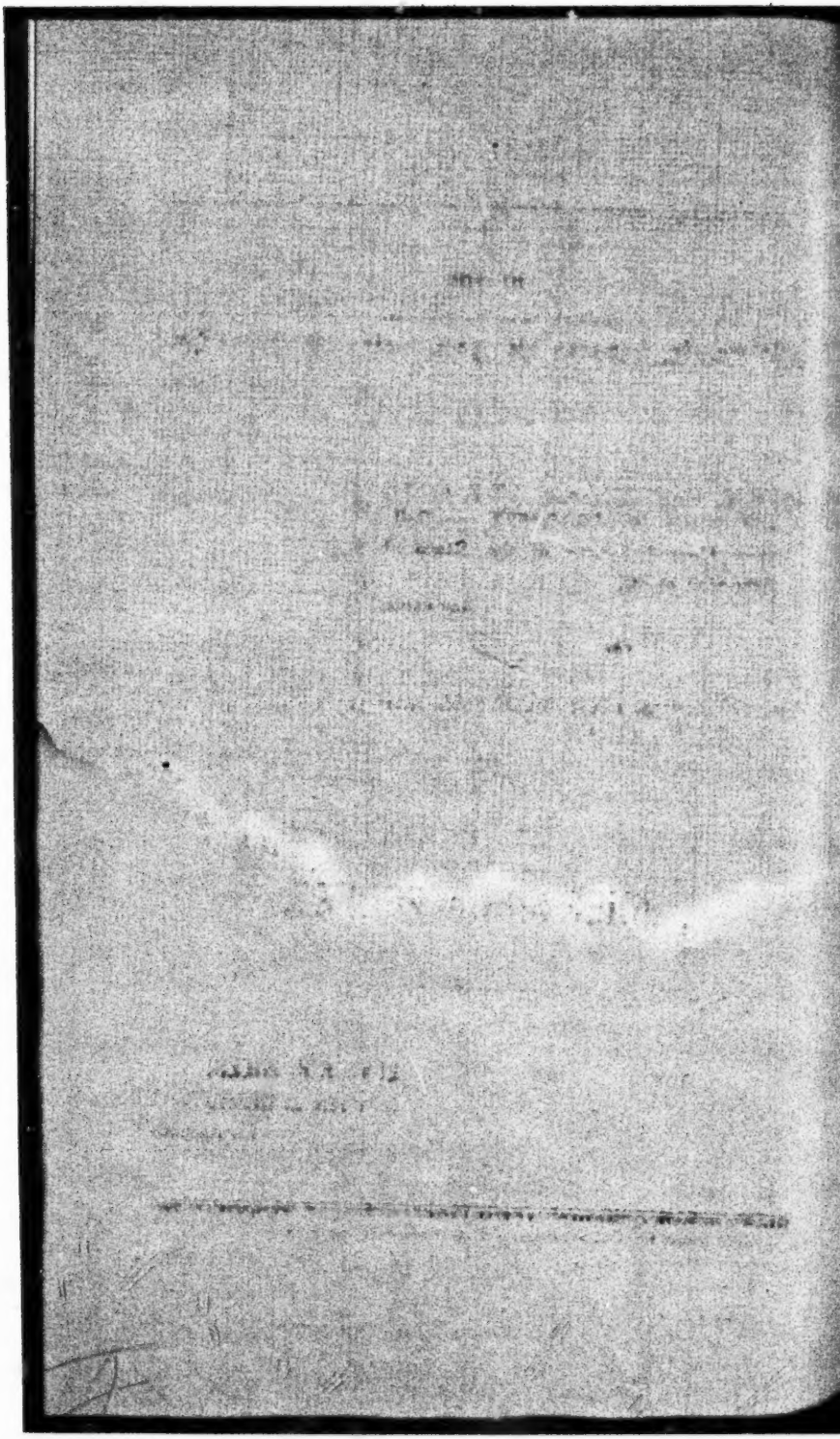
MORRIS M. COHN,
For Appellants.



IN THE

SUPREME COURT OF THE UNITED STATES.

JOHN E. HAMPTON, ROBERT P. ALLEN and JOHN W. CROCKETT, as Railroad Commissioners of the State of Arkansas et al.,

Appellants,

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

As recited in brief for appellants, "appellee, a railroad company and common carrier of persons and goods, owning and operating lines of railroad between points in Arkansas, and *between points located in that State and points in other States* (italics are ours), filed its bill of complaint in equity * * * praying, for the reasons therein set forth, that the appellants * * * be restrained and enjoined from instituting, prosecuting, aiding, abetting, directing or causing to be insti-

tuted or prosecuted any and all suits of whatsoever nature by which it may be sought to enforce or recover the fines and penalties contemplated by the Act of the Legislature of that State, approved April 19, 1907, * * * and certain orders of the Railroad Commission being order No. 346 and order No. 353-A."

It was alleged in the bill of appellee that it was engaged in interstate commerce in the States of Missouri, Arkansas, Tennessee, Illinois, Louisiana, Kansas and the Indian Territory, owning its continuous lines into the several States named, and engaged in interstate commerce through its connections between points in all other States of the United States, and that it was a common carrier, subject to the Act of Congress of the United States of February 4, 1887, entitled "An Act to Regulate Commerce" and the several amendments thereto (T. R., p. 4). This allegation was not denied. It was further averred that the freight cars required by the Arkansas authorities to be furnished, under heavy penalties, were "instrumentalities equipped, prepared, held and used by your orator for the movement of interstate commerce," and that they were exclusively under the control of the Interstate Commerce Commission of the United States, and that any acts of the Arkansas Legislature or rules of the Commission requiring the furnishing of cars to shippers under heavy penalties were void, as in violation of the commerce clause of the Constitution (T. R., p. 10).

The Legislature of Arkansas passed an Act, which was approved April 19, 1907, which, among other things, required railroad companies to furnish to shippers such car or cars as they might demand, upon certain notice being given, the cars to be furnished within

given times. Failure to comply with this requirement made the railroad company liable to the shipper in the sum of five dollars per car per day or fraction of a day (T. R., p. 26).

It was further provided, by Section 22 of the Act, that failure to comply with the provisions of the Act or with any requirement of the Railroad Commission as to furnishing cars on application of shippers, should involve the railroad company in a penalty of not less than five hundred nor more than three thousand dollars for each violation of the Act (T. R., 32). The Railroad Commission made its order No. 346, following the language of the statute as to requirements for the furnishing of cars.

By Act of the Legislature, approved March 11, 1899, it was provided that any person or corporation operating a railroad, etc., who should violate any rules of the Commission regarding railroads, should be liable to a penalty of not less than five hundred dollars nor more than three thousand dollars for each violation of the rules of the Commission (T. R., p. 20).

During the summer of 1907, certain coal operators made demands upon appellee for cars which were not furnished, and made complaint thereafter to the Commission, and the Commission issued its orders "353-A" and "353-A *nunc pro tunc*", finding the appellee guilty of violating its orders and the Act of April 19, 1907, and directing suits to be instituted for the recovery of the penalties hereinbefore mentioned, aggregating an enormous amount (T. R., pp. 39 to 44). A permanent injunction was granted, the learned trial Judge holding the Act of April 19, 1907 invalid, the decree simply declaring the Act "to be unconstitutional and void" (T. R., p. 74). In a memorandum of decision filed by

the Court at the time, the Court construed the Act to be void because the Legislature had made its provisions apply to interstate shipments as fully as to intrastate shipments, and therefore it should fall under the ruling of this Court in Howard v. Ill. Cent. Railroad Co., 207 U. S. 463. The learned trial Judge held it also void because its requirements made no exceptions for cases of sudden congestion of traffic or actual inability to furnish cars, and was therefore in conflict with the rule laid down in Houston, Etc., Railroad v. Mayes, 201 U. S. 321. Subsequently, the Supreme Court of Arkansas, in the case of Oliver v. Chicago, Rock Island & Pacific Railway Company, 89 Ark. 466, sustained the Act as to intrastate commerce, and held adversely to the holdings of the Court below in this case upon the points outlined by the Court in his opinion.

BRIEF AND ARGUMENT.

The contention of appellee is that the Act of April 19, 1907, and the requirements of the Railroad Commission as to the furnishing of cars under its order No. 346 of June 19, 1907, when applied to carriers such as appellee, and engaged in interstate commerce, as appellee is shown and conceded by this record to be, is void, as being in effect a burden upon interstate commerce.

The proposition is simply this: That if the power be conceded to a state to require, under heavy penalties, the furnishing of cars by an interstate carrier for intrastate shipments, then, as between the states served by such common carrier, the State exacting the heaviest penalties will bring to its intrastate shippers an undue proportion of the cars available to such carrier; and likewise, if states are conceded the power to require the furnishing of cars by interstate carriers, under heavy penalties, to intrastate shippers, then, if the penalties imposed by Federal authority for failure to furnish cars for interstate traffic are less than those imposed by the states, the carriers will devote to intrastate traffic an undue proportion of their available cars.

Section 3 of the Act to Regulate Commerce provides, among other things, as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to sub-

> ject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever,"

and the Court below, therefore, very properly held that the act and orders of the Commission are in conflict with Section 3 of the Act of Congress relating to interstate commerce; and they do not make proper allowance for the duty appellee owes to other localities in supplying cars.

It was held in Southern Railway Co. v. United States, decided October, 1911, that all cars of any railroad engaged in interstate commerce were subject to the provisions of the "Safety Appliance Act." In that case, speaking of cars of such interstate carriers, the Court said:

> "Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both."

Congress, in the Act of June 29, 1906, defined "transportation" to include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, etc., and declared it to be the "duty of every carrier subject to the provisions of this Act to provide and furnish such *transportation* (italics are ours) upon reasonable request therefor", and all other provisions of the Act provide penalties for failure to comply with the provisions of the Act.

The doctrine upon which we rely for our contention here is well stated by Judge Sanborn in the case of Shepard v. Northern Pacific Railway Company, 184 Fed., at page 770, in the following language:

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"If the plenary power of the nation to protect the freedom of and to regulate interstate commerce and the attempted exercise by a state of its power to regulate intrastate commerce, or the attempted exercise of any of its other powers, impinge or conflict, the former must prevail and the latter must give way, because the Constitution and the acts of Congress passed in pursuance thereof are the supreme law of the land, and 'that which is not supreme must yield to that which is supreme.' Brown v. Maryland, 12 Wheat. 419, 448, 6 L. Ed. 678; Gibbons v. Ogden, 9 Wheat. 1, 209, 210, 6 L. Ed. 23; Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U. S. 557, 573, 7 Sup. Ct. 4, 30 L. Ed. 244; Covington, Etc., Bridge Co. v. Kentucky, 154 U. S. 204, 211, 212, 216, 217, 222, 14 Sup. Ct. 1087, 38 L. Ed. 962; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 327, 328, 26 Sup. Ct. 491, 50 L. Ed. 772; Cleveland, C., C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 517, 519, 521, 20 Sup. Ct. 722, 44 L. Ed. 868; Mississippi Railroad Commission v. Illinois Central R. Co., 203 U. S. 335, 343, 27 Sup. Ct. 90, 51 L. Ed. 209; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 28 Sup. Ct. 121, 52 L. Ed. 230; Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 24, 27, 37, 30 Sup. Ct. 190, 54 L. Ed. 355; Ludwig v. Western Union Telegraph Co., 216 U. S. 146, 162, 30 Sup. Ct. 280, 54 L. Ed. 423; Pullman Company v. Kansas, 216 U. S. 56, 65, 30 Sup. Ct. 232, 54 L. Ed. 378; Hall v. De Cuir, 95 U. S. 485, 488-490, 497, 498-513, 24 L. Ed. 547; Bowman v. Chicago, Etc., Ry. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Welton v. Missouri, 91 U. S. 275, 280, 23 L. Ed. 347; Crutcher v. Kentucky, 141 U. S. 47, 57, 58, 59, 11 Sup. Ct. 851, 35 L. Ed. 649."

Special cases wherein the principle for which we con-

tend has been applied, and acts of State authorities have been held void upon this principle, are found in (again quoting Judge Sanborn) "statutes imposing burdensome conditions on the landing of passengers from vessels employed in foreign commerce (Henderson v. Mayor of New York, Etc., 92 U. S. 259, 268, 23 L. Ed. 543); requiring carriers engaged in interstate commerce to give all persons upon their public conveyances equal rights and privileges in all parts of those conveyances without discrimination or distinction on account of race or color (Hall v. De Cuir, 95 U. S. 485, 486, 488, 490, 24 L. Ed. 547); requiring telegraph companies to deliver dispatches by messenger to the persons to whom they are addressed so far as such a statute attempts to regulate the delivery of such dispatches at places in other States (Western Union Telegraph Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187); prohibiting a higher rate for a short haul entirely within the State than that charged for a longer interstate haul (Wabash, Etc., Ry. Co. v. Illinois, 118 U. S. 557, 573, 7 Sup. Ct. 4, 30 L. Ed. 244); forbidding common carriers to bring intoxicating liquors into a State without a certificate that the consignee is authorized to sell such liquors in the county (Bowman v. Chicago, Etc., Ry. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700); prohibiting the sale in a state of fresh meats which have not been taken from animals inspected within the State within 24 hours before they are slaughtered (Minnesota v. Barber, 136 U. S. 313, 322, 329, 10 Sup. Ct. 862, 34 L. Ed. 455); prohibiting the sale of fresh meats from animals slaughtered 100 miles or more from the place at which they are offered for sale, unless they have been previously inspected by local inspectors (Brimmer v. Reb-

man, 138 U. S. 78, 81, 11 Sup. Ct. 213, 34 L. Ed. 862); prescribing tolls for the use of a bridge across a river between two States (Covington Bridge Co. v. Kentucky, 154 U. S. 204, 211, 212, 216, 217, 222, 14 Sup. Ct. 1087, 38 L. Ed. 962); requiring a railroad company engaged in interstate commerce to furnish an unreasonable number of cars to shippers in the State upon demand (Houston, Etc., Ry. Co. v. Maves, 201 U. S. 321, 327, 328, 26 Sup. Ct. 491, 50 L. Ed. 772); requiring such a company to stop all its regular trains at county seats on its line (Cleveland, Etc., Ry. Co. v. Illinois, 177 U. S. 514, 517, 519, 20 Sup. Ct. 722, 44 L. Ed. 868); requiring such a company to stop its through fast trains at a specified station in the State (Atlantic Coast Line R. R. Co. v. Wharton, 207 U. S. 328, 334, 337, 28 Sup. Ct. 121, 52 L. Ed. 230); levying a tax 'equal to 1 per cent of its gross receipts' on each railroad lying wholly within the State (Galveston, Harrisburg, Etc., Ry. Co. v. Texas, 210 U. S. 217, 227, 28 Sup. Ct. 638, 52 L. Ed. 1031); and requiring foreign corporations to pay large fees as a condition of carrying on business entirely intrastate within a State, although by the orders of the charter board expressly leaving these corporations free to carry on interstate commerce in the State without any condition or restriction (Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 7, 27, 37, 30 Sup. Ct. 190, 54 L. Ed. 355; Pullman Company v. Kansas, 216 U. S. 56, 65, 30 Sup. Ct. 232, 54 L. Ed. 378; Ludwig v. Western Union Telegraph Co., 216 U. S. 146, 162, 163, 30 Sup. Ct. 280, 54 L. Ed. 423)."

And again quoting Judge Sanborn: "It is the effect and not the terms or purpose of State regulations of its local commerce that determines whether or not they

so substantially burden interstate commerce that they violate the commercial clause of the Constitution."

We respectfully submit that the Act of the Arkansas Legislature and the rules of the Arkansas Railroad Commission which are assailed in this litigation come within the class of State statutes and Commission rules that must be declared void as unduly interfering with and burdening, through their necessary effect, interstate commerce.

Respectfully submitted,

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For Appellee.